SUPREME COURT OF APPEALS OF VIRGINIA.

COMMONWEALTH *v.* PERROW.

Jan. 16, 1919.

[97 S. E. 820.]

1. Criminal Law (§ 1024 (1)*)—Right of Appeal by Government.—The provision in Const. U. S. Amend, 5, that no person shall be put twice in jeopardy for the same offense, which is construed to deny the government the right of appeal in criminal cases, applies only to federal, and not to state, courts.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 183; 3 Va.-W. Va. Enc. Dig. 198.]

2. Criminal Law (§ 177*)—Double Jeopardy.—Code 1904, § 3893, providing immunity against second trial for same offense, includes only cases where there has first been an acquittal by the jury upon the facts and merits, and does not in terms apply to a case where no jury was sworn, and the warrant of the justice was quashed on ground of unconstitutionality of statute under which prosecution was commenced.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 183, 184.]

3. Criminal Law (§ 1005*)—Appeal by Government—Statute.—Code 1904, § 4052, providing for appeal on behalf of commonwealth in cases of violation of law declared unconstitutional by circuit or corporation court, does not conflict with Const. § 88, providing that no appeal shall be allowed to commonwealth in any case involving life or liberty, except a case involving violation of law relating to state revenue, in so far as cases where only punishment is a fine are concerned.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 473.]

4. Criminal Law (§ 1024 (13)*)—Right of Appeal by Government—Revenue Cases.—Under Const. § 8, allowing appeal to commonwealth in prosecutions for violation of a state revenue law, when commonwealth seeks reversal and new trial, as distinguished from decision of legal questions for use as precedent, rule against second jeopardy proprio vigore destroys right of appeal, and accused need not abide result of appeal, and then resort to plea of autrefois acquit or autrefois convict.

[Ed. Note.—For other cases, see 14 Va.-W. Va. Enc. Dig. 79.]

5. Criminal Law (§ 163*)—Double Jeopardy.—Under Const. § 8, prohibiting any person to be put twice in jeopardy for the same offense, it is immaterial what the punishment for that offense may be.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 183.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

6. Criminal Law (§ 1005*)—Right of Appeal by Government—Revenue Laws.—Under Const. § 8, and section 88, as to second jeopardy, Legislature may allow commonwealth appeal in any criminal case involving revenue law, regardless of degree of punishment.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 473.]

7. Criminal Law (§ 165*)—Double Jeopardy—"Jeopardy."—While "jeopardy," as ordinarily understood in legal parlance, refers to danger of conviction and punishment which accused incurs in a criminal case, where a jury has been impaneled and sworn, the spirit of the Constitution extends its meaning to any discharge upon a defense constituting a bar to the prosecution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jeopardy.* For other cases, see 2 Va.-W. Va. Enc. Dig. 183.]

8. Criminal Law (§ 260 (3)*)—Right of Appeal by Government—Revenue Laws.—Violation of Acts 1899-1900, c. 806, imposing penalty for soliciting men to leave Buckingham county, without securing a license as a labor agent, is not a violation of a state revenue law, and therefore commonwealth cannot, in view of Const. § 8, and Code 1904, § 4052, appeal under Const. § 88, from a judgment of a justice of the peace, quashing warrant on ground that such act is unconstitutional.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 473; 2 Va.-W. Va. Enc. Dig. 185; 15 Va.-W. Va. Enc. Dig. 58.]

Error to Circuit Court, Buckingham County.

John H. Perrow, having been convicted in a court of a justice of the peace of a misdemeanor, appealed to the circuit court, which quashed and dismissed the warrant, and the Commonwealth brings error, and defendant moves to dismiss the writ. Motion sustained, and writ dismissed.

E. W. Hubbard and *A. L. Pitts, Jr.*, both of Buckingham, and *F. C. Moon,* of Lynchburg, for the Commonwealth.

J. O. Shepherd, of Palmyra, and *J. Gordon Bohannon,* of Petersburg, for defendant in error.

KELLY, J. By an act of the General Assembly, approved March 5, 1900, entitled "An act for the protection of farmers, etc., in Buckingham county by requiring license of labor agents and imposing penalties for violation" (Acts 1899-1900, page 868), the board of supervisors of Buckingham county was authorized and empowered to place a license tax upon all labor agents coming into the county for the purpose of inducing lo-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

cal laborers to go elsewhere. The provision prescribing penalties for violation of the act was as follows:

"Any agent or representative found in any part of the county soliciting men to leave said county for the purposes heretofore stated, without having in his possession license or receipt showing that license has been paid, shall be deemed guilty of a misdemeanor, and punished, on conviction, by fine of not less than fifty nor more than one hundred dollars in each case."

John H. Perrow was convicted and fined $75 upon a warrant issued by a justice of the peace of Buckingham county, charging him with "soliciting labor illegally and contrary to" the act above recited. He appealed to the circuit court, and that court, being of opinion that the statute was unconstitutional and void, quashed and dismissed the warrant. To that judgment, upon an application in the name of the commonwealth, this writ of error was awarded.

The first question claiming our attention arises upon a motion to dismiss the writ of error on the ground that this case does not involve the violation of any law relating to the state revenue, and that, except in revenue cases, no appeal lies for the commonwealth in any criminal prosecution.

It is conceded that the right of appeal is in terms conferred by section 4052 of the Code, providing for an appeal on behalf of the commonwealth, not only in all cases for the violation of a law relating to the state revenue, but also in all cases for the violation of a law which has been declared to be unconstitutional by the judgment of a circuit or corporation court; but it is contended that this section of the Code, except as to revenue cases, is itself unconstitutional and void.

[1] Prior to the adoption of the Constitution of 1902, there was no express or implied constitutional inhibition upon the right of appeal to the commonwealth, and, as the subject was then controlled entirely by the common law, there was no legal reason why the Legislature might not, by express statute, have allowed the state a writ of error in any criminal case. The provision in the Constitution of the United States (Amendment 5) that no person shall be liable to be put twice in jeopardy of life or limb for the same offense which is construed to deny the government the right of appeal in criminal cases, applies only to the federal courts, and not to the courts of the several states. See the very interesting discussion of this subject in a note by Judge M. P. Burks in 6 Virginia Law Register, page 244.

[2] Section 3893 of the Code, providing immunity against a second trial, for the same offense, speaks only of cases in which there has first been an acquittal "by the jury upon the

fact and merits," and does not, in terms at least, apply to the instant case, where no jury was sworn. That section is discussed by Judge Burks in the note mentioned, and he shows that the cases cited thereunder in the Code do not raise or decide the question now under consideration.

[3] There are two provisions in the present Constitution of the state, however, which place definite limits upon the power of the Legislature in respect to granting the right of appeal to the state, namely, section 8, which provides that no man shall "be put twice in jeopardy for the same offense, but an appeal may be allowed the commonwealth in all prosecutions for the violation of a law relating to the state revenue," and section 88, which provides that "no appeal shall be allowed to the commonwealth in any case involving the life or liberty of a person, except that an appeal by the commonwealth may be allowed by law in any case involving the violation of a law relating to the state revenue."

In the case of Commonwealth *v.* Willcox, 111 Va. 849, 69 S. E. 1027, it was held that under the provisions of section 88 quoted above, a writ of error does not lie upon the petition of the commonwealth in any case involving the life or liberty of a person where no question touching the state revenue is involved, and hence that so much of section 4052 of the Code as provides for a writ of error at the instance of the commonwealth in a case merely involving the violation of a law declared to be unconstitutional, is itself null and void. The case at bar, however, is not expressly covered by the Willcox Case, because the offense with which Willcox was charged was one involving his liberty, and therefore came clearly within the terms of section 88 of the Constitution, upon which the decision turned, while the offense with which Perrow is here charged is punishable by fine only, and does not directly imperil his liberty. Forbes *v.* State Council, 107 Va. 853, 859, 60 S. E. 81. Section 88 expressly confers the right of appeal in all revenue cases, regardless of the form or degree of punishment, and expressly denies it in all other than revenue cases, where the penalty is such as to involve life or liberty, thus leaving the Legislature, so far as this particular section of the Constitution is concerned, a free hand with reference to appeals in criminal cases where no other punishment than a fine is prescribed. As to this latter class of cases it is apparent, therefore, that section 4052 of the Code is not in conflict with the Constitution, unless made so by section 8 thereof quoted above, and the effect of which in this respect we must now proceed to consider.

[4] This section, as we have seen, incorporates for the

first time in the fundamental written law of the state the well-known common-law doctrine of former jeopardy. When the purpose of an appeal in a criminal case is to procure on behalf of the state a reversal of the judgment and a new trial of the accused (as distinguished from a mere review and decision of the legal questions involved for use as a precedent in future cases), the rule against a second jeopardy for the same offense operates proprio vigore to destroy the right of appeal. The matter is jurisdictional, and the accused is not obliged to first abide the result of the appeal, and, in the event of a reversal, resort to his plea of autrefois acquit or autrefois convict to avoid a second trial. 8 R. C. L. p. 168, § 162, and authorities cited in note 19; State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202, and note thereto page 213.

The avowed purpose of the appeal sought in the instant case is to obtain a reversal of the judgment, to the end that the accused may be again brought to trial; and no appeal lies for this purpose, if the rule against a second jeopardy applies to the case.

Does, then, a misdemeanor punishable only by fine constitute such an "offense" as to fall within the letter and spirit of section 8 of the Constitution? The doctrine of "once in jeopardy" had its origin in cases of treason and felony, but it has long been applied to misdemeanors. 1 Bishop's New Criminal Law, p. 596, § 990; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Jones' Case, 20 Grat. (61 Va.) 848, 852. As to the latter class of cases—that is, misdemeanor—the only question in the application of the doctrine seems to be whether it can be invoked in misdemeanor cases not involving any corporal punishment. This question does not appear to have arisen very frequently, and, when it has, the disposition of it, so far as we have been able to discover, has generally turned upon constitutional provisions expressly or by implication defining the offenses which fall within their purview.

In the case of Jones *v.* State, 15 Ark. 261, it is held that where a defendant, indicted for a misdemeanor punishable by fine only, has been tried and acquitted, and the judgment reversed on appeal, he may be tried again, without any violation of the Arkansas Constitution, which provides "that no person shall for the same offense be put twice in jeopardy of life or limb."

And in State *v.* Spear, 6 Mo. 644, a case of indictment for misdemeanor punishable by both fine and imprisonment, Napton, J., delivering the opinion of the Supreme Court of Missouri, said:

"I hold that the verdict of acquittal is a complete protection

to the defendant against any further proceedings. The Constitution declares (article 13, § 10) that no person, after having been once acquitted by a jury, can for the same offense again be put in jeopardy of life or limb. By this provision I understand that in all criminal prosecutions where a conviction would subject him to capital punishment, or would render him liable to be restrained from his personal liberty, an acquittal by a jury is a complete bar to any subsequent trial."

It seems from the cases cited that the Arkansas and Missouri courts would apply the doctrine of former jeopardy to all misdemeanors for which the punishment might mean an imprisonment, and would deny it in all misdemeanor cases where the punishment consisted only of a fine. But it will be observed that in both states the offenses covered by the constitutional guarantee against a second trial were expressly declared to be offenses involving life or limb.

On the other hand, in McCauley *v.* State, 26 Ala. 135, 144, the Alabama Supreme Court holds that—

"Any discharge of the jury, which would protect a person indicted for a capital offense from a subsequent trial, will work the same result in favor of a person indicted for a misdemeanor; that in this respect, there is no middle ground—no difference between a capital case and a case of misdemeanor, as the Constitution guarantees the right of trial by jury 'in all criminal prosecutions.'"

This was a case in which the accused was charged with unlawful gaming. The report does not show, and we are not otherwise informed, what was the prescribed penalty; but the phrase "all criminal cases" is broad enough to cover all misdemeanors. The case involved the effect of discharging a jury after the defendant had been put to his trial upon a plea of not guilty, and the doctrine of former jeopardy was directly involved.

In Brink *v.* State, 18 Tex. App. 344, 51 Am. Rep. 317, where the charge against the accused was that he had sold a cigar on Sunday, it was held that his plea of former jeopardy for the same offense should have been sustained.

[5] But, whatever view may prevail in other jurisdictions, we are of opinion that in this state the rule against putting any person in jeopardy more than one time for the same offense is to be applied in all criminal cases, regardless of the character and degree of the punishment.

In Jones' Case, 20 Grat. (61 Va.) 848, 853, Moncure, P., delivering the opinion of the court, said:

"The ground on which the view of the counsel for the plaintiff in error rests, is a provision of the Constitution of the

United States, which is in these words, 'Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb,' and which has been considered to be nothing more than a solemn reassertion of one of the maxims of the common law, that the life of a man shall not be twice in jeopardy for one and the same offense.

"This provision of the federal Constitution applies, as such, only to the courts of the United States, and not to the courts of the several states, though it has been repeated, in effect, if not in words, in some of the state Constitutions, but not in that of Virginia. The common-law maxim, however, on which this constitutional provision is supposed to be founded, does exist in Virginia, and seems to go even farther than that provision; for while that is confined, in terms, to cases involving 'life or limb,' the maxim extends to all criminal cases."

And in Day's Case, 23 Grat. (64 Va.) 915, this court applied the doctrine of former jeopardy to an offense which consisted of a violation of the gaming statute then in force, and which was punishable only by a fine.

It is true that both the Jones Case† and the Day Case were decided long before there was in Virginia any constitutional guaranty against a second jeopardy, but it will be observed that both of these cases use substantially the same language in announcing and applying the common-law immunity against a second trial for the same offense as is found in our present Constitution; and we are of opinion that this language, as now embodied in section 8, was intended to cover all criminal cases.

[6] It follows from what has been said that under both section 8 and section 88 of the Constitution the Legislature may allow the commonwealth an appeal in any criminal case involving the revenue law, regardless of the degree of punishment, but that by virtue of the operation of section 8 such appeal does not lie in any other kind of criminal cases; and that therefore section 4052 of the Code is unconstitutional, except in so far as it refers to appeals in revenue cases.

[7] There was no jury trial in the instant case, and we have not overlooked the fact that jeopardy, as ordinarily understood in legal parlance, refers to the danger of conviction and punishment which a defendant incurs in a criminal case where a jury has been impaneled and sworn. But we are of opinion that the spirit and purpose of the immunity intended to be secured by the doctrine in question will be violated whenever a defendant in any criminal case has been formerly tried by competent authority, whether court or jury, and discharged upon a defense constituting a bar to the proceeding, whether that defense be rested upon the law or the facts.

In 12 Cyc. p. 84, it is stated:

"As a general rule, the state has no right to a writ of error or an appeal from a judgment in favor of a defendant, whether upon a verdict of acquittal or upon the determination by the court of a question of law, unless it be expressly conferred by statute in the plainest and most unequivocal terms."

In United States *v.* Sanges, 144 U. S. 310, 12 Sup. Ct. 609, 36 L. Ed. 445, the court said:

"A state has no right to * * * a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law."

[8] Having reached this conclusion, we must now decide whether the offense with which Perrow was charged involved the violation of a state revenue law; and we have no difficulty in holding that it does not. The title and the preamble of the act which he was accused of having violated show very clearly that the sole purpose of the enactment was to protect local interests in Buckingham county. At the time the act was passed there was a general statute, a part of the general tax law of the state, imposing a license tax, for the express purpose of helping to support the government, upon all persons throughout the state who might engage in the business of a labor agent. The same general statute, as amended, appears now as sections 128 and 129 of the tax bill (Code 1904, Append. p. 2247). There is nothing in the title of the act of March 5, 1900, and nothing in its declared purpose, which can be reasonably construed to bring it within the meaning of a revenue law, as that term is used in sections 8 and 88 of the Constitution. The purpose of the constitutional provision was to protect the state government in the tremendously important matter of enforcing the laws enacted to secure an income for its support and maintenance. The Buckingham county act was a special and local law, plainly intended for local police purposes.

We are of opinion that the motion to dismiss the writ of error must be sustained.

Dismissed.

Note.

Right of State to Appeal in Criminal Cases.—In order to justify an appeal by the state in a criminal case, it must be authorized by an express and valid statute. State *v.* Felch (Vt.), 105 Atl. 23; United States *v.* Sanges, 144 U. S. 310, 36 L. Ed. 445.

Many of the decisions denying a writ of error to the state after judgment for the defendant on a verdict of acquittal have proceeded upon the ground that to grant it would be to put him twice in jeopardy, in violation of a constitutional provision. See State *v.* Anderson, 3 Sm. & Marsh. 751; State *v.* Hand, 6 Arkansas, 169; State *v.* Burris, 3 Texas, 118; People *v.* Webb, 38 California, 467; People *v.*

Swift, 59 Michigan, 529, 541; United States *v.* Sanges, 144 U. S. 310, 313, 36 L. Ed. 445.

"But the courts of many States, including some of great authority, have denied, upon broader grounds, the right of the state to bring a writ of error in any criminal case whatever, even when the discharge of the defendant was upon the decision of an issue of law by the court, as on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment." United States *v.* Sanges, 144 U. S. 310, 313, 36 L. Ed. 445 (wherein numerous authorities are cited). In State *v.* Jones, 7 Ga. 422, the court said: "The common law maxim, and the Constitution are founded in the humanity of the law, and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the State. It is, doubtless, in the spirit of this benign rule of the common law, embodied in the Federal Constitution—a spirit of liberty and justice, tempered with mercy—that, in several of the States of this Union, in criminal causes a writ of error has been denied to the State."

In those States in which the government, in the absence of any statute expressly giving it the right, has been allowed to bring error, or appeal in the nature of error, after judgment for the defendant on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment, the question appears to have become settled by early practice before it was contested. See United States *v.* Sanges, 144 U. S. 310, 316, 36 L. Ed. 445, wherein the authorities are collected.

"The law of England on this matter is not wholly free from doubt. But the theory that at common law the King could have a writ of error in a criminal case after judgment for the defendant has little support beyond sayings of Lord Coke and Lord Hale, seeming to imply, but by no means affirming it; two attempts in the House of Lords, near the end of the seventeenth century, to reverse a reversal of an attainder; and an Irish case and two or three English cases, decided more than sixty years after the Declaration of Independence; in none of which does the question of the right of the Crown in this respect appear to have been suggested by counsel or considered by the court. 3 Inst. 214; 2 Hale P. C. 247, 248, 394, 395; Rex *v.* Walcott, Show. P. C. 127; Rex *v.* Tucker, Show P. C. 186; S. C. 1 Ld. Raym. 1; Regina *v.* Houston (1841), 2 Crawford & Dix, 191; The Queen *v.* Millis (1844), 10 Cl. & Fin. 534; The Queen *v.* Wilson (1844), 6 Q. B. 620; The Queen *v.* Chadwick (1847), 11 Q. B. 173, 205. And from the time of Lord Hale to that of Chadwick's Case, just cited, the text-books, with hardly an exception, either assume or assert that the defendant (or his representatives) is the only party who can have either a new trial or a writ of error in a criminal case; and that a judgment in his favor is final and conclusive. See 2 Hawk. c. 47, § 12; c. 50, §§ 10 et seq.; Bac. Ab. Trial, L. 9; Error, B; 1 Chit. Crim. Law, 657, 747; Stark. Crim. Pl. (2d ed.) 357, 367, 371; Archb. Crim. Pl. (12th Eng. and 6th Am. ed.) 177, 199." United States *v.* Sanges, 144 U. S. 310, 312, 36 L. Ed. 445.

Federal Prohibition of Double Jeopardy Not Operative upon States.—The holding of the principal case that the provisions of the Fifth Amendment to the Constitution of the United States, wherein double jeopardy is prohibited, are not intended to limit the powers of the state governments in respect to their own people, but merely operate as restraints upon federal action, finds support in Ex parte Spies, 123 U. S. 131, 8 Sup. Ct. 21, 31 L. Ed. 81; Hunter *v.* Pittsburg, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151; State *v.* Felch (Vt.), 105 Atl. 23, 25.

Validity of Statute or Military Orders Giving Government Right of Appeal.—A West Virginia statute attempting to give the state a right of appeal in criminal cases, was held unconstitutional in Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529, L. R. A. 1915F, 1093. Under a California statute giving the state a right of appeal to the Supreme Court on all questions of law arising in prosecutions for felonies, it was held that an acquittal in the court below was final, and that the defendant could not again be put in jeopardy. People *v.* Webb, 38 Cal. 467. A statute of Illinois attempted to give the complainant a right of appeal in prosecutions for illegal fishing. In People *v.* Miner, 144 Ill. 308, 33 N. E. 40, 19 L. R. A. 342, it was held that the statute was unconstitutional. Though the question was not directly involved, it was said in State *v.* Hart, 90 N. J. Law, 261, 101 Atl. 278, L. R. A. 1917F, 985, that "it is clear that it is not within the constitutional power of legislative authority to confer by statute" upon the state the right of appeal in criminal cases.

Where by the provisions of a certain military order regularly promulgated for the government of the Philippine Islands, the right of the government to appeal from a judgment of acquittal in a court of first instance was recognized, it was held that this was repugnant to the constitutional provision that "no person for the same offense shall be twice put in jeopardy of punishment," contained in an act of Congress subsequently passed for the administration of the affairs of the Islands, and was repealed by it. Kepner *v.* United States, 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655.

Same—In Absence of Constitutional Provision—Theory That First Jeopardy Continues until Result Free from Error Reached.—The constitutions of Connecticut and Vermont contain no provisions relating to second jeopardy. In State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, it was held that Conn. Gen. St., § 1637, providing that appeals on questions of law arising in criminal trials may be taken by the state, with the permission of the trial judge, in the same manner and to the same effect as if taken by the accused, authorizes an appeal by the state, in the nature of a motion for a new trial, after an acquittal by a jury. This decision was followed in State *v.* Felch, 105 Atl. 23, wherein it was held that Vermont Gen. Laws, § 2598, giving the state right to review on exceptions in a criminal case, is not violative of Bill of Rights, art. 10, providing that no person can be deprived of liberty, except by the law of the land, nor of the due process clause of the Fourteenth Amendment to the federal Constitution.

The decision of the Connecticut court has been severely criticised as laying down an unsound and unheard of doctrine. This was the first case to oppose the well-settled rule of law that a former acquittal prevents a review of the trial by a higher court. Though Connecticut has no such provision in its constitution, the court entered into an extended discussion as to what constitutes second jeopardy and decided that the first jeopardy continues until a result free from error is attained, and therefore a review by appeal to correct errors did not put a man twice in jeopardy.

The Connecticut court said: "The 'putting in jeopardy' means a jeopardy which is real, and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure. While such prosecution remains undetermined, the one jeopardy has not been exhausted. The jeopardy is not exhausted by an indictment followed by a nolle; nor by a nolle after the trial has commenced, when the prisoner does not claim a verdict. 2 Swift, Dig. 402; State *v.* Carvey, 42 Conn. 233. Nor by the discharge of a jury

in case of the sickness of a judge (Nugent *v.* State, 4 Stew. & P. 72); the sickness of a juror (Rex *v.* Scalbert, 2 Leach. 620; Rex *v.* Edwards, 3 Camp. 207; Com. *v.* Merrill, Thacher Crim. Cas. 1); the sickness of the prisoner (Rex *v.* Stevenson, 2 Leach. 546; Rex *v.* Streek, 2 Car. & P. 413; State *v.* McKee, 1 Bailey, 651); in the case of the expiration of the term of court during the progress of the trial (Reg. *v.* Newton, 3 Cox, Cr. Cas. 489; State *v.* McLemore, 2 Hill. [S. C.] 680); in case of the inability of the jury to agree (State *v.* Woodruff, 2 Day, 504; Reg. *v.* Charlesworth, 1 Best 2 S. 460; Reg. *v.* Davison, 2 Fost. & F. 252; People *v.* Olcott, 2 Johns. Cas. 301; Com. *v.* Bowden, 9 Mass. 494; Hoffman *v.* State, 20 Md. 425; Hurley *v.* State, 6 Ohio, 399; U. S. *v.* Perez, 9 Wheat. 579); in case of influence exerted on the jury, against the prosecution, by an officer in charge of the jury (State *v.* Wiseman, 68 N. C. 203); in case of misconduct or incapacity of a juror (U. S. *v.* Morris, 1 Curt. 23, Fed. Cas. No. 15, 815; People *v.* Damon, 13 Wend. 351; Stone *v.* People, 2 Scam. 326; Dilworth *v.* Com., 12 Grat. 689; Reg. *v.* Ward, 10 Cox. Cr. Cas. 573); even after the case has been committed to the jury (State *v.* Tuller, 34 Conn. 294); and when the prisoner offers to waive the disqualification of a juror who has expressed an opinion against him, and protests against the discharge of the jury (State *v.* Allen, 46 Conn. 531). Nor is it exhausted by an acquittal when the verdict has been obtained through the fraud of the accused. Chit. Cr. Law, p. 657; State *v.* Reed, 26 Conn. 208."

The theory that the jeopardy involved is single and continuous until a result is reached that is free from error is not without its defenders upon the bench of the Supreme Court of the United States. In Kepner *v.* United States, 195 U. S. 100, the question was thoroughly considered and a bare majority of the court adhered to the old doctrine and refused to adopt the reasoning of the Connecticut case. Justices White, Holmes and McKenna dissented, and a fourth, who voted with the majority, did so on other grounds. The dissenting opinion said in part: "It seems to me that logically and rationally a man can not be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree. United States *v.* Perez, 9 Wheat. 579; see Simmons *v.* United States, 142 U. S. 148; Logan *v.* United States, 144 U. S. 263; Thompson *v.* United States, 155 U. S. 271, or notwithstanding their agreement and verdict, if the verdict is set aside on the prisoner's exceptions for error in the trial. Hopt *v.* People, 104 U. S. 631, 635; 110 U. S. 574; 114 U. S. 488, 492; 120 U. S. 430, 442; United States *v.* Ball, 163 U. S. 662, 672. He even may be tried on a new indictment if the judgment on the first is arrested upon motion. Ex parte Lange, 18 Wall. 163, 174; 1 Bish. Crim. Law (5th ed.), § 998. I may refer further to the opinions of Kent and Curtis in People *v.* Olcott, 2 Johns. Cas. 301; S. C., 2 Day, 507, n.; United States *v.* Morris, 1 Curtis, 23, and to the well-seasoned decision in State *v.* Lee, 65 Connecticut, 265."

Under the Spanish system of law it seems that a person was not regarded as being in jeopardy in the legal sense until there had been a final judgment in the court of last resort. Kepner *v.* United States, 195 U. S. 100, 121, 49 L. Ed. 114.

B. S.